Office - Supreme Court, U.S.
FILED
MAY 4 1984
ALEXANDER L. STEVAS,
CLERK

83 - 1818

No.

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

DONNA HYLIN, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF DONALD HYLIN, DECEASED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REX E. LEE
Solicitor General
RICHARD K. WILLARD
Acting Assistant Attorney General
KENNETH S. GELLER
Deputy Solicitor General
CARTER G. PHILLIPS
Assistant to the Solicitor General
ROBERT S. GREENSPAN
MARK W. PENNAK
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the United States is liable under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2674, as a "private individual under like circumstances" for the allegedly negligent enforcement of the Mine Safety Act by inspectors of the Mine Enforcement and Safety Administration (MESA).

2. Whether a suit arising out of a MESA inspector's allegedly negligent enforcement of the Mine Safety Act is barred as a claim based upon the performance of a "discretionary function" within the meaning of 28 U.S.C. 2680(a).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	2
Reasons for granting the petition	9
Conclusion	12
Appendix A	1a
Appendix B	26a
Appendix C	28a
Appendix D	30a

TABLE OF AUTHORITIES

Cases:

Arney v. *United states*, 479 F.2d 653 ..... 9, 12

Dalehite v. *United States*, 346 U.S. 15 7

Donovan v. *Dewey*, 452 U.S. 594 3

Feres v. *United States*, 340 U.S. 135 10

Raymer v. *United States*, 660 F.2d 1136, cert. denied, 456 U.S. 944 11

Roberson v. *United States*, 382 F.2d 714... 10

United Scottish Insurance v. *United States*, 692 F.2d 1209, cert. granted, No. 82-1350 (May 16, 1983)..... 7, 9, 10, 11, 12

United States v. *S.A. Empresa De Viacao Aerea Rio Grandense*, cert. granted, No. 82-1349 (May 16, 1983) 9, 10, 11, 12

Statutes and regulations:

Federal Aviation Act of 1958, 49 U.S.C. (& Supp. V) 1301 *et seq.*:

49 U.S.C. 1425(a)..... 11

Statutes and regulations—Continued: Page

Federal Metal and Nonmetallic Mine Safety Act of 1966, Pub. L. No. 89-577, 80 Stat. 772 *et seq.* 2
§ 6(b), 80 Stat. 774 3
§ 8, 80 Stat. 775 3
§ 8(a), 80 Stat. 775 3
§ 8(b), 80 Stat. 776 4

Federal Mine Safety and Health Act of 1977, Pub. L. No. 95-164, 91 Stat. 1290, codified at 30 U.S.C. 801 *et seq.* 2
§ 301(b)(1), 91 Stat. 1317 3
§ 307, 91 Stat. 1322 3
30 U.S.C. (1976 ed.) 801(e) 4, 11
30 U.S.C. 801(g) 11
30 U.S.C. 811 3
30 U.S.C. 813 3

Federal Tort Claims Act:
28 U.S.C. 1346(b) 2, 5, 6, 10
28 U.S.C. 2671 *et seq* 5
28 U.S.C. 2674 ..... 2, 6, 10
28 U.S.C. 2680 2
28 U.S.C. 2680(a) 7, 11

30 C.F.R. Pt. 55 (1976) 3
30 C.F.R.:
Pt. 55 5
Pt. 55.9-7 5

Miscellaneous:
Restatement (Second) of Torts (1965) .. 6, 7, 10, 11

In the Supreme Court of the United States

OCTOBER TERM, 1983

No.

UNITED STATES OF AMERICA, PETITIONER

v.

DONNA HYLIN, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF DONALD HYLIN, DECEASED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-25a) is reported at 715 F.2d 1206. The opinion of the district court (App., *infra*, 30a-40a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 1983 (App., *infra*, 28a-29a). A petition for rehearing was denied on December 7, 1983 (App., *infra*, 26a-27a). On February 22, 1984, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including May 4, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. 1346(b) provides, in pertinent part:

> [T]he district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, * * * for injury * * * or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2674 provides, in pertinent part:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances * * *.

28 U.S.C. 2680 provides, in pertinent part:

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> (a) Any claim * * * based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

STATEMENT

1. Under the Federal Metal and Nonmetallic Mine Safety Act of 1966 (Mine Safety Act), Pub. L. No. 89-577, 80 Stat. 772 *et seq.*,[1] the Secretary of the Inter-

---

[1] The Mine Safety Act was repealed in 1977 and replaced by the Federal Mine Safety and Health Act of 1977 (1977 Act), Pub. L. No. 95-164, 91 Stat. 1290, codified at 30 U.S.C. 801 *et seq.*, which became effective 120 days after November 9, 1977,

rior was authorized to issue "mandatory standards" concerning "conditions or practices of a kind which could reasonably be expected to cause death or serious physical harm" to mine workers, Pub. L. No. 89-577, § 6(b), 80 Stat. 774. The "mandatory standards" relevant to this case were set forth in 30 C.F.R. Pt. 55 (1976) and were enforced by the Federal Mine Enforcement and Safety Administration (MESA) under the authority of the Secretary. MESA was also empowered to inspect and investigate mines covered by the Mine Safety Act. Section 8, 80 Stat. 775. See *Donovan* v. *Dewey*, 452 U.S. 594, 596 (1981).

If a MESA inspector discovered a condition that "could reasonably be expected to cause death or serious physical harm immediately," the inspector was authorized to order the immediate withdrawal of persons endangered by the condition. Section 8(a), 80 Stat. 775. If an inspection revealed a failure to comply with a mandatory standard that did not create "a danger that could reasonably be expected to cause death or serious physical harm * * * immediately," the MESA inspector was empowered to issue a notice requiring abatement

---

the date of the 1977 Act's passage. Section 307, 91 Stat. 1322. Since the accident that gave rise to this lawsuit took place on September 1, 1977, this case technically involves the Mine Safety Act. The 1977 Act, however, preserved many of the features of the Mine Safety Act, including the duty (now imposed on the Mine Safety and Health Administration, under the supervision of the Secretary of Labor) to issue regulations and make inspections and investigations for the purpose of enforcing the Act. See 30 U.S.C. 811, 813. The 1977 Act also provided that the regulations issued under the Mine Safety Act "shall remain in effect as mandatory health or safety standards." Section 301(b)(1), 91 Stat. 1317. The regulations involved in this case are still in effect. 30 C.F.R. Pt. 55.

of the condition within a specified reasonable time. Section 8(b), 80 Stat. 776. Notwithstanding MESA's authority, however, the mine owner at all times retained "the primary responsibility to prevent the existence of [unhealthy and unsafe] conditions and practices in such mines." 30 U.S.C. (1976 ed.) 801(e).

Acting pursuant to this statutory authority, MESA inspectors on February 10 and 11, 1977, inspected a clay mine owned by the Ristokrat Clay Products Company, an Illinois corporation that mined clay for the manufacture of bricks (App., *infra*, 3a). Ristokrat's mine used an open conveyor belt, which carried clay first to a grinding area and then to dust bins in a separate room (*id.* at 24a). Along each side of the belt was a narrow walkway, which the employees used to enter the mine or the dust bin room. On the east wall of this passageway was an electrical junction box that was in a damaged condition. The cover of the box could not be closed and the wires entering the box were not adequately insulated at the point where the conductors entered the box. *Id.* at 2a-3a. It is not clear from the record how long the junction box had existed in this defective condition (*id.* at 39a). It is undisputed, however, that the box was in violation of mandatory standards established by the Secretary under the Mine Safety Act (*id.* at 3a n.1).

During the February 1977 inspection, MESA inspectors noticed that mine employees customarily walked along the west side of the conveyor belt and then crossed the belt in order to get to the dust bins located on the east side of the belt. Apparently, employees preferred to walk along the west side of the belt because the east side walkway was partially obstructed

by chutes. App., *infra*, 4a-5a. Noting the unguarded condition of the belt, the inspectors cited the mine owner for a violation of 30 C.F.R. Pt. 55.9-7, the mandatory standard requiring that all unguarded conveyor belts be equipped with emergency stop devices (App., *infra*, 3a-4a & n.2). Because the continuous processing of the clay into dust made it impractical to install stop devices on the belt, the inspectors permitted the mine owner to abate the Notice of Violation by the construction of two-by-four handrails along both sides of the belt (*id.* at 21a). No Notice of Violation was issued for the defective junction box (*id.* at 33a).

The construction of the handrails narrowed the walkway along both sides of the belt and ended the employees' practice of walking along the west side of the conveyor system and crossing over the belt to get to the dust bin on the east side. The handrails also reduced by four inches the passageway adjacent to the electrical junction box, resulting in a clearance between the junction box and the rail of approximately 14 inches. App., *infra*, 2a, 4a-5a. On September 1, 1977, respondent's husband, while walking along the east side of the belt, came into contact with the defective junction box and was electrocuted (*id.* at 2a).

2. Respondent filed suit against the United States under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.*, in the United States District Court for the Northern District of Illinois, claiming that the MESA inspectors had been negligent in failing to observe and cite for correction the defective electrical junction box (App., *infra*, 5a). Alternatively, respondent claimed that, in requiring the construction of the handrails, the MESA inspectors had negligently "created or increased

the risk of injury from the defective junction box" (*ibid.*).

After a trial limited to the issue of liability, the district court entered judgment for the government (App., *infra*, 30a-40a). The court held that the mine owner's negligence in allowing the defective junction box to remain unrepaired was the proximate cause of the death of respondent's husband (*id.* at 38a-39a). The court concluded that "the cause of the injury was entirely the result of a defective electrical junction box that was in that wall and not seen by anybody, including Donald Hylin's fellow employees" (*id.* at 39a).

The court of appeals reversed (App., *infra*, 1a-25a). Before considering the district court's finding on proximate causation, the court of appeals rejected the government's alternative grounds for affirming the judgment that were based directly on the Federal Tort Claims Act. First, the court of appeals held that even though respondent's claim arose out of MESA's regulatory responsibilities, which involve a "uniquely governmental" function, the private person limitation in 28 U.S.C. 1346(b) and 2674 did not bar recovery (App., *infra*, 6a-7a). Instead, the court held that the United States could be liable as a "private individual under like circumstances" under the good samaritan doctrine of Illinois law embodied in the Restatement (Second) of Torts §324A (1965) (App., *infra*, 7a-8a).[2]

---

[2] Section 324A of the Restatement (Second) of Torts (1965) provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm

The court of appeals remarked that respondent's first theory of liability under the Restatement—negligent failure to inspect—was "more troubling" (App., *infra*, 8a). The court concluded that it did not have to address that issue, however, because Illinois "would permit a finding of negligence here under [respondent's] second theory of liability—the increase in risk of injury created by the MESA inspectors' effectively non-optional instruction to build a handrail which had * * * the foreseeable effect of diverting worker ingress to the dust bin past the dangerous junction box through a passageway which was further narrowed by the erection of the handrail" (*id.* at 7a).

The court of appeals also rejected the government's contention that respondent's claim was barred by the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. 2680(a). Relying on the Ninth Circuit's decision in *United Scottish Insurance* v. *United States*, 692 F.2d 1209, 1212 (1982), cert. granted, No. 82-1350 (May 16, 1983), the court reasoned that the issuance of a Notice of Violation requiring the erection of the handrail was compelled by the MESA regulations and therefore did not involve " 'policy judgment and decision' " (App., *infra*, 14a, quoting *Dalehite* v. *United States*, 346 U.S. 15, 35-36 (1953)).

---

resulting from his failure to exercise reasonable care to protect his undertaking, if

(a) his failure to exercise reasonable care increases the risk of such harm, or

(b) he has undertaken to perform a duty owed by the other to the third person, or

(c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Finally, the court of appeals held that the district court's finding that the inspectors' negligence was not the proximate cause of the injury was "clearly erroneous" (App., *infra*, 16a-23a). The court of appeals noted that under state law more than one act of negligence may be the proximate cause of injury. Thus, the fact that Ristokrat's failure to repair the junction box "was 'closer' to the injury" (*id.* at 22a) did not preclude a finding of liability for the antecedent negligence of the inspectors, so long as the ultimate injury was still probable and foreseeable. On that issue, the court of appeals concluded that an inspector "left the mine knowing that the handrail would be installed and consequently that the workers would be forced to pass closely by the junction box whose dangerous and defective condition the inspectors observed" (*id.* at 23a).[3]

Judge Bauer dissented (App., *infra*, 24a-25a). Noting that the majority had found respondent's first theory of liability to be "troublesome," Judge Bauer found respondent's second theory of liability to be indistinguishable, stating (*id.* at 24a):

> The risk, if any, that rose from the inspector's order that handrails be installed was not inherent in the handrails. Rather, the risk was that by re-

---

[3] The court of appeals stated that the inspectors "observed [the junction box] and saw its dangerous condition" (App., *infra*, 3a; see also *id.* at 21a). However, the court did not cite any evidence to support this assertion, which is directly contrary to the findings of the district court (see *id.* at 39a). See page 6, *supra*. In fact, the court of appeals' statement is not supported by anything in the record; there is no evidence that the inspectors either examined or were cognizant of the condition of the box at the time they issued the Notice of Violation with regard to the conveyor belt.

ducing the free access past the junction box by four inches there was an increased probability that a worker would make physical contact with the defective junction box. And this risk, the risk of physical contact with the junction box, could only have been avoided by inspection and correction of the junction box itself.

REASONS FOR GRANTING THE PETITION

This case presents important questions of the government's liability under the Federal Tort Claims Act that are essentially identical to those pending in *United States* v. *S.A. Empresa De Viacao Aerea Rio Grandense* (*Varig*), cert. granted, No. 82-1349 (May 16, 1983), and *United States* v. *United Scottish Insurance*, cert. granted, No. 82-1350 (May 16, 1983).[4] Accordingly, this Court's decision in those cases is likely to have a substantial effect on the validity of the court of appeals' decision in this case. The Court therefore may wish to hold this Petition pending its decision in those cases.[5]

---

[4] The only factual difference between this case and *Varig* and *United Scottish* is that here the inspectors ordered a modification that created an unforeseen hazard that was not ordered abated by the inspectors, whereas, in the other cases, the inspectors simply failed to discover any defect. This case, however, is not like *Arney* v. *United States*, 479 F.2d 653 (9th Cir. 1973), where the inspector ordered a fuel line modified in a way that caused it to become dangerous. The handrails that were installed pursuant to the Notice of Violation were not inherently dangerous and did not by themselves cause any injury. Thus, as Judge Bauer correctly concluded, there is no difference "between 'mere negligent failure to inspect the junction box and order correction' * * * and * * * mere negligent failure to inspect the junction box in conjunction with its environs and order correction" (App., *infra*, 25a (citation omitted)).

[5] A copy of our brief in *Varig* and *United Scottish* is being sent to counsel for respondent.

At issue in *Varig* and *United Scottish* is the liability of the United States under the Federal Tort Claims Act for the alleged negligence of the Federal Aviation Administration (FAA) in issuing type certificates for airplanes that subsequently crashed. In our brief in those cases, we argue that the private person limitation in the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2674, indicates that Congress did "not waive sovereign immunity in situations where there is no liability for private individuals 'even remotely analogous to that which [plaintiffs] are asserting against the United States.'" (U.S. Br. 23, quoting *Feres* v. *United States*, 340 U.S. 135, 141 (1950)). Our statement there is equally applicable here: "The actions of a government agency in enforcing health and safety legislation pursuant to a program of inspection and certification have no counterpart in the private sector" (U.S. Br. 25). Thus, respondent's attempt to impose liability on the United States for the alleged negligence of MESA inspectors performing law enforcement functions is impermissible under Sections 1346(b) and 2674.

With regard to the good samaritan doctrine, we argue in *Varig* and *United Scottish* (U.S. Br. 29-34) that the doctrine is not satisfied in cases involving federal regulatory agencies that merely oversee private industry's efforts to comply with mandatory health or safety standards, because such federal agencies do not "render services to another * * * necessary for the protection of a third person," as required by Section 324A of the Restatement (Second) of Torts (1965). Neither the FAA in *Varig* and *United Scottish* nor MESA in this case purported "to render a *direct* service to the person who was harmed, or to persons of that class." *Roberson* v. *United States*, 382 F.2d 714, 720 (9th Cir. 1967) (emphasis added). Instead, both agencies enforced their re-

spective statutory mandates for the public good. Similarly, neither the FAA nor MESA performed a *necessary* service, because the private employer in both situations retained the primary and nondelegable responsibility to comply with the health and safety requirements of the relevant statute. 49 U.S.C. 1425(a); 30 U.S.C. (1976 ed.) 801(e), 801(g). See *Raymer* v. *United States*, 660 F.2d 1136, 1143 (6th Cir. 1981), cert. denied, 456 U.S. 944 (1982).[6]

Finally, we argue in *Varig* and *United Scottish* (U.S. Br. 39-46) that the discretionary function exception in 28 U.S.C. 2680(a) precludes liability for claims against federal agencies arising out of their regulatory enforcement activities, because review of an agency's law enforcement decisions in the guise of tort litigation will inevitably "change dramatically [the agency's] regulatory function from that of a policeman to" (in this case) that of a mine operator (U.S. Br. 46). The court of appeals' analysis here may be even more disruptive to the law enforcement efforts of MESA than the Ninth Circuit's decision in *Varig* and *United Scottish* is to the FAA

---

[6] We also argue in *Varig* and *United Scottish* (U.S. Br. 34-37) that the plaintiffs in those cases could not reasonably have relied upon the FAA's enforcement efforts, as required by Section 324A(c) of the Restatement (Second) of Torts (1965). That contention does not apply here because respondent and the court of appeals based liability on Section 324A(a) of the Restatement, which provides for liability where the alleged negligence "increases the risk of * * * harm." Reliance is not an element of that tort. But the requirement that the defendant render a service that is necessary to protect a third person applies to all three varieties of good samaritan liability.

We do not seek review here of the decision below that the district court clearly erred in finding that the inspectors' actions were not the proximate cause of respondent's injury. This determination is essentially factbound and presents no issue in common with any contention in *Varig* or *United Scottish*.

because it may tend to deter inspectors from vigorous enforcement of suspected violations. The court characterized MESA's role as "intermeddle[rs]" who "create new dangers" in contrast to "actors who, without some assumption of total responsibility, refrain from changing the *status quo* they observe" (App., *infra*, 13a). While this comparison may be apt in a case such as *Arney* v. *United States*, 479 F.2d 653 (9th Cir. 1973), where the inspector's modification by itself created a danger, it seems completely misapplied where, as here, the ordered modification (the handrail) was not in itself dangerous, the "new dangers" were not apparent to anyone and the inspectors were otherwise ordering the elimination of an existing safety hazard.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's decision in *United States* v. *S.A. Empresa De Viacao Aerea Rio Grandense*, No. 82-1349, and *United States* v. *United Scottish Insurance*, No. 82-1350, and then disposed of as appropriate in light of that decision.

Respectfully submitted.

REX E. LEE
Solicitor General
RICHARD K. WILLARD
Acting Assistant Attorney General
KENNETH S. GELLER
Deputy Solicitor General
CARTER G. PHILLIPS
Assistant to the Solicitor General
ROBERT S. GREENSPAN
MARK W. PENNAK
Attorneys

MAY 1984

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 81-2931

DONNA HYLIN, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF DONALD HYLIN, DECEASED, PLAINTIFF-APPELLANT,

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 78 C 1742—George N. Leighton, *Judge.*

Argued February 10, 1983—
Decided August 23, 1983

Before BAUER, WOOD, and ESCHBACH, *Circuit Judges.*

WOOD, *Circuit Judge.* Plaintiff, Donna M. Hylin, appeals from the judgment of the district court in favor of defendant, the United States, in an action brought under the Federal Tort Claims Act, 28 U.S.C. § 2675 *et seq.* (FTCA). The district court found that the allegedly negligent acts and omissions of federal mine inspectors were not the proximate cause of the death of plaintiff's husband, Donald Hylin. The government supports this finding, but, contrary to the district court's ruling, also

argues that federal regulatory enforcement activities, conducted under the authority of the Federal Metal and Nonmetallic Mine Safety Act, 30 U.S.C. § 721 et seq. (1976) (Mine Safety Act), cannot give rise under these circumstances to a cause of action under the FTCA. We reverse the district court's finding with respect to proximate cause and hold that plaintiff is entitled to recovery under the FTCA.

I.

The facts in this case are largely undisputed. Donald Hylin, a twenty-year employee of the Ristokrat Clay Products Company, a business engaged in mining clay and manufacturing clay bricks in the State of Illinois, was electrocuted on September 1, 1977 when he came into contact with a defective electrical junction box in a conveyor room at the mine. The box was located on the east wall of a passageway connecting the grinding room with a dust bin area. Running the entire length of the passageway was a conveyor belt which carried the mined clay. On both sides of the belt were narrow walkways. The walkway on the east side ran the entire length of the conveyor and up the incline to the dust bin area. The walkway on the west side only extended to the incline ramp. Each walkway, at the time of the accident, was separated from the conveyor belt by newly erected handrails which are at issue in this case and which were erected by the mine in an attempt to comply with a citation resulting from a federal inspection. The clearance between the junction box, located approximately halfway down the east walkway, and the hand rail on that side of the conveyor was reduced to about fourteen inches by the new handrails.

At the time of Hylin's death, and for many previous years, the junction box was in damaged and dangerous condition and in violation of federal standards.[1] The cover of the box lacked an effective means to keep it closed, the wires entering the box were inadequately insulated where the conductors entered the box, and there were two holes in the cover of the box that had been caused by a short circuit or ground fault some seven or eight years prior to Hylin's death.

As a clay mine operation, Ristokrat was subject to the jurisdiction of the Mine Enforcement and Safety Administration (MESA). It was MESA's function, under the authority of the Secretary of the Interior, to enforce the provisions of the Mine Safety Act as amended, including the mandatory safety standards promulgated thereunder and published under Title 30, Part 55 of the Code of Federal Regulations. On February 10 and 11, 1977, several months before Hylin's death, the mine was inspected, pursuant to the Act, by MESA inspectors Donald Johnson and John Guthrie. Neither during this regular inspection nor at a follow-up spot inspection conducted on March 1, 1977, did MESA inspectors inspect the junction box although they observed it and saw its dangerous condition. The inspectors also noticed that the conveyor belt was unguarded and that the workers had a practice of crossing over the conveyor while the belt was in use. The inspectors cited the mine for a violation of 30 C.F.R. § 55.9-7 which required that all conveyors either have guards or be equipped

[1] It is undisputed that the condition of the junction box violated the applicable regulations under the Mine Safety Act contained at 30 C.F.R. §§ 55.12-8, 55.12-13, 55.12-30, 55.12-32 (1976).

with emergency stop devices.[2] Notice was given of the violation with directions that the condition be abated.[3]

The nature of the continuous processing of clay dust from the grinding operation to the conveyor to the dust bins rendered the installation of an emergency stop device on the conveyor infeasible. The use of a stop device would result in clay piling up on the conveyor and jamming the machines. At the time of the citation, the infeasibility of using the stop device was explained by mine personnel to inspector Guthrie who acknowledged that the handrail therefore necessarily would be the mine's response to the Notice of Violation. The mine, with the inspectors' knowledge, subsequently constructed two-by-four handrails along both sides of the conveyor.[4]

At the time of the inspection, the senior MESA inspector, Johnson, was aware from observing footprints and from conversations with Ristokrat's employees that it had been the employees' previous custom to travel from the grinding room to the dust bin area by walking along the west side of the conveyor, crossing the con-

---

[2] 30 C.F.R. § 55.9-7; *Mandatory*. Unguarded conveyors with walkways shall be equipped with emergency stop devices or cords along their full length.

30 C.F.R. § 55.11-1: *Mandatory*. Safe means of access shall be provided and maintained to all working places.

[3] Notice of Violation No. 53 states: "55.9-7 (Notice No. 53) issued February 10, 1977. An inside handrail or an emergency stop device was not provided on the incline belt conveyor. Shall be abated by February 24, 1977."

[4] Inspector Guthrie's report from the spot, or follow-up inspection conducted March 1, 1977 states:

> "55.9-7 (Notice No. 53) issued February 10, 1977 was abated March 1, 1977. An inside handrail was provided on the incline belt conveyor."

veyor, and then walking up the incline ramp; this route was preferred to the east walkway because it was wider and not obstructed by chutes and the electric junction box. After the handrails were constructed pursuant to the MESA citation, the workers were forced to traverse the narrower east passageway that was already partially obstructed by the junction box; the construction of the handrails further narrowed the clearance in the passageway between the box and the conveyor by at least four inches. It was in the course of following this newly necessitated route that plaintiff was electrocuted by the junction box.

The plaintiff, individually and as administratrix of her husband's estate, sued the United States under the FTCA for the alleged negligence of the MESA inspectors. Plaintiff's first contention was that the negligent failure of the inspectors to observe and cite for corrections the dangerous electrical junction box caused her husband's death. Alternatively, she claimed that the enforcement of the mandatory safety standard requiring handrails, recognized by both the mine owner and the inspectors as the only practical solution, had either created or increased the risk of injury from the defective junction box.

The district court, without a jury, tried only the liability issue. The government offered no evidence.

The court ruled in favor of the government on both liability theories proffered by the plaintiff—negligent failure to inspect, and negligent enhancement of risk. With regard to the latter theory, the court concluded that there was no evidence that the defendant had ever enhanced the risk of electrocution by ordering erection of the handrail and that the evidence instead showed

that the erection of the handrail resulted from Ristokrat's choice. The district court further held that the erection of the handrail was not a proximate cause of plaintiff's death. With respect to the first theory—negligent failure to inspect and cite—the district court did not explicitly determine whether the inspectors' failure was negligent, but instead held that the plaintiff's death was not proximately caused by the defendant's failure to inspect but rather by Ristokrat's negligence in maintaining the box in defective condition.

Plaintiff appeals from the district court's finding with respect to both theories, arguing that the evidence clearly establishes negligence and proximate cause. The defendant argues that the district court's determination regarding proximate cause was correct, but argues further that, even if it were not correct, the Federal Mine Safety Act creates no duty or reliance between the defendant and the plaintiff or the mine sufficient to support a finding of negligence under Illinois tort law, which is expressly made applicable by the FTCA.

II.

The Federal Tort Claims Act renders the United States "liable ... in the same manner and to the same extent as a private individual under like circumstances...." 28 U.S.C. § 2674. The substantive law governing the imposition of liability in each FTCA case is "the law of the place where the act or omission occurred," 28 U.S.C. § 1346(b). It will be established, moreover, that FTCA liability may be based even on conduct which is "uniquely governmental," such as inspection and certification, as long as the state in which the conduct occurred would recognize liability if the

government tort feasor were a private person. *Indian Towing Co.* v. *United States*, 350 U.S. 61, 69 (1955). While the government is correct in asserting that the violation of a duty created by a federal statute and its implementing regulations *alone* does not create an FTCA cause of action, *Baker* v. *F&F Investment Co.*, 489 F.2d 829, 835 (7th Cir. 1973), the issue here is not the violation of a federal duty alone but whether the conduct complained of breached a duty existing under Illinois law. *United Scottish Insurance Co.* v. *United States*, 614 F.2d 188, 193 (9th Cir. 1982); *Raymer* v. *United States*, 660 F.2d 1136, 1140 (6th Cir. 1981). That the United States may thereby become liable under "novel and unprecedented forms of liability," *United States* v. *Muniz*, 374 U.S. 150, 159 (1962), does not undermine the FTCA's admonition that the government shall be liable "in accordance with the law of the place where the act or omission occurred." Thus, the first issue put before this court by the government is really whether Illinois law would permit the finding of negligence in this case if the United States were a private person. *Blessing* v. *United States*, 447 F. Supp. 1160, 1186 (E.D. Pa. 1978).

We think that the Illinois courts would permit a finding of negligence here under the plaintiff's second theory of liability—the increase in risk of injury created by the MESA inspectors' effectively non-optional instruction to build a handrail which had, as we discuss *infra*, the foreseeable effect of diverting worker ingress to the dust bin past the dangerous junction box through a passageway which was further narrowed by the erection of the handrail. Because we find that Illinois law would permit a finding of negligence in this ex-

traordinary instance of the positive creation of increased danger by an inspector, we need not determine today whether Illinois would recognize liability under the plaintiff's first—and frankly more troubling—theory of mere negligent failure to inspect the junction box and order correction.

The basis of liability under both the plaintiff's theories is the "good samaritan doctrine" as enunciated in the Restatement (Second) of Torts § 324A (1965) and adopted by the Illinois courts. *Pippin* v. *Chicago Housing Authority*, 78 Ill. 2d 204, 210 (1979) ("In assessing [the inspector's] duty in tort owed to Pippin as a result of its contract with the Authority, we find section 324A of the Restatement (Second) of Torts to be apposite."); *Cross* v. *Wells Fargo Alarm Services*, 82 Ill. 2d 313, 317 (1980); *Chisolm* v. *Stephens*, 47 Ill. App. 3d 999, 1005 (1st Dist. 1977); *Green* v. *City of Chicago*, 48 Ill. App. 3d 502, 504 (1st Dist. 1976). The Restatement (Second) of Torts § 324A provides as follows:

> § 324A. Liability to Third Person for Negligent Performance of Undertaking
>
> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or

> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

The essence of plaintiff's second theory—that the MESA inspectors failed to exercise reasonable care in ordering the erection of the handrail, thus increasing the likelihood of electrocution—is, of course, echoed in Section 324A(a), while the plaintiff's first theory, negligent inspection, is reflected in Section 324A(b) and (c).

As we understand the government's argument, it disputes primarily that there could never be negligence here under the negligent inspection theory reflected in Sections 324(b) and (c) because neither has MESA "undertaken to perform a duty [*i.e.* to ensure a reasonable safe work environment] owed by the other [the mine] to the third person [the plaintiff]" under Section 324A(b) nor was the "harm ... suffered because of reliance of the [mine] or the [plaintiff] upon the undertaking." The absence of such a prerequisite "duty" or "reliance," the government argues, is facially apparent from the caveats contained in Section 801 of the Mine Safety Act, 30 U.S.C. § 801, under which the inspection was conducted. Section 801(e) states that "the operators of such mines with the assistance of the miners have the primary responsibility to prevent the existence of such unsafe and unhealthful conditions and practices in such mines." Section 801(g) further states that "[i]t is the purpose of this chapter ... (2) to require that each operator of a coal or other mine and every miner in such mine comply with such standards" as are promulgated under the Act by the Secretaries of Health and Human Services and Labor. The government contends that this statutory placement of responsibility precludes a court

from finding the requisite duty or reliance as a matter of law.

We note that the Sixth Circuit has found this argument convincing, holding in *Raymer* v. *United States*, 660 F.2d 1136, 1143 (1981), that "[i]n the face of this language which completely negates the idea that responsibility for mine safety has been shifted to the federal government, it would be unreasonable to rely on the mere failure of federal inspectors to require immediate abatement of the ... [violation]." But whatever the force of this position, and it has been questioned by some Ninth Circuit decisions finding FTCA liability for inspections conducted under Federal Aviation Administration statutes containing similar "primary responsibility" boilerplate,[5] and whatever its applicability under the Illinois tort doctrines concerning mere failure to inspect, the "reliance" and "duty" requirements of Sections 324A(b) and (c) cannot block recovery here, for plaintiff's second theory of liability rests wholly on the "increased risk of harm" theory of Section 324A(a).

Although we have found no Illinois cases involving actions founded on ameliorative conduct engendering an increase in the risk of harm rather than a mere failure to act,[6] it is quite clear from an examination of Section

---

[5] *See, e.g., S.A. Empresa de Viaco Aerea Rio Grandense* v. *United States*, 692 F.2d 1205, 1208 (9th Cir. 1982); *United Scottish Insurance Co.* v. *United States (II)*, 692 F.2d 1209, 1211 (9th Cir. 1982); *but see, Clemente* v. *United States*, 567 F.2d 1140, 1149 (1st Cir. 1978).

[6] The court in *Cross* v. *Wells Fargo Alarm Services*, 82 Ill. 2d 313, 317 (1980), briefly noted plaintiff's claim against a private security agency for the latter's *failure to inspect or evaluate* after-hours security conditions in a public housing unit. The claim was formally premised on both Sections 324A(a) and (c). In dismissing the complaint, the court discussed the failure of

324A and its commentary that liability may be imposed for a defendant's actions increasing the risk of harm, even though there is no evidence that defendant had assumed an employer's or proprietor's general duty of providing reasonably safe conditions to his employees or customers and no evidence that the employees or customers "relied" to their detriment on the defendant's provision of services.

First, as a textual matter, Section 324A's three theories—increase in risk of harm, assumption of duty, and reliance—are phrased in the disjunctive; while subsections (b) and (c) contain the words "duty" and "reliance," subsection (a) is conspicuously devoid of such terms. Second, the text's accompanying illustrations and commentary suggest that liability under Section 324A(a) may exist without presence of "duty" or "reliance." Illustration 1, for example, sets forth this vignette:

> 1. A operates a grocery store. An electric light hanging over one of the aisles of the store becomes

---

the plaintiff to plead reliance by the public housing authority on such evaluations. However, the two-theory context of the discussion and the factual inappositeness of a mere "failure to inspect or evaluate" claim to Section 324A(a) analysis suggests that the court did not mean to impute the "reliance" requirement, contained only in Section 324A(c), to 324A(a) as well. Instead, the court apparently disposed of the Section 324A(a) claim by relying on its earlier finding that defendant assumed no contractual obligation at all to conduct the evaluations, thus finding unsatisfied the basic Section 324A requirement that the defendant at least "undertake[] ... to render [the disputed] services...." That the Illinois Supreme Court, when addressing the issue more fully, has kept the requirements of subsection (a) analytically distinct from the "reliance" and "duty" prerequisites of subsections (b) and (c) is demonstrated in *Pippin* v. *Chicago Housing Authority*, 78 Ill. 2d 204, 211 (1979), quoted in text *infra* at 11.

> defective, and A calls B Electric Company to repair it. B Company sends a workman, who repairs the light, but leaves the fixture so insecurely attached that it falls upon and injures C, a customer in the store who is walking down the aisle. B Company is subject to liability to C.

Thus, liability is placed upon the outside actor even though it has not, as the government would analogously have us assume here, either caused customers or the company to rely on its undertaking with respect to store maintenance or assumed the company's duty to maintain a reasonably safe store. That the defendant's actions increasing risk need not occur as part of a general duty or trigger "reliance" to be actionable under Section 324A(a) is also underscored by comment d which states, "*Even where the negligence of the actor does not create any new risk or increase an existing one*, he is *still* subject to liability if, by his undertaking with the other, he has undertaken a duty which the other owes to the third person." (emphasis added). Such commentary suggests that increased risk of harm provides a wholly independent and self-sufficient, rather than a subsidiary, basis for liability. *See also Pippin* v. *Chicago Housing Authority*, 78 Ill.2d 204, 211 (1979) ("Interstate's duty does not arise under either subsection (a) or (b), as plaintiff's complaint does not allege that Interstate's conduct actually increased the risk of harm to Pippin, and ... there was no preexisting duty .... Subsection (c), however, sets up reliance upon the undertaking as a *separate basis* for finding liability." (emphasis added)).

And this reading, we believe, comports most fully with common sense and sound policy. The disjunctive

regime of liability under Section 324A simply affords less protection to actors who, like the MESA inspectors here, positively intermeddle and create new dangers, than to actors who, without some assumption of total responsibility, refrain from changing the *status quo* they observe. This regime is consonant with the good samaritan concept as with much of tort law by fully encouraging only more modest and passive forms of altruism.

In sum, we find that Section 324A, as adopted by the Illinois courts, allows recovery by the plaintiff in this case even assuming *arguendo*, as the government contends, that MESA neither created reliance by miners on safety inspections nor caused the government to assume the employer's role of guarantor of safe job conditions.

We are not the first federal court to recognize the appropriateness of an FTCA action rooted in state tort law corresponding to Restatement (Second) of Torts § 324A(a). Several federal cases have alluded to the applicability of this analysis while finding that the facts of the case did not meet the Section's requirements. *See, e.g.*, *Raymer* v. *United States*, 660 F.2d 1136, 1143 (6th Cir. 1981); *Clemente* v. *United States*, 567 F.2d 1140, 1145 (1st Cir. 1978); *Blessing* v. *United States*, 447 F. Supp. 1160, 1197 (E.D. Pa. 1978). The government has presented no argument, and we know of none that exists, for the proposition that the principles of Section 324A(a) are inapplicable to the acts of MESA inspectors. We, therefore, affirm the district court's holding that a cause of action exists under Illinois law against a private person for a negligent inspection which increases the risk of harm to the beneficiaries of that inspection. As the action is recognized by the State of Illi-

nois against private individuals, the FTCA's limited waiver of sovereign immunity applies and the United States may be held liable for similarly negligent post-inspection actions ordered on its behalf.

III.

The government urges alternatively that, even if a valid cause of action otherwise exists for the inspector's enhancement of risk under Illinois tort law and hence the FTCA, such a claim is barred under the "discretionary function" exception in the FTCA, 28 U.S.C. § 2680(a). We find this contention to be without merit.

The Supreme Court has not comprehensively defined the scope of the "discretionary function" exception, other than to note that it "includes determinations made by executives or administrators in establishing plans, specifications or schedules or operations. Where there is room for policy judgment and decision there is discretion." *Dalehite* v. *United States*, 346 U.S. 15, 35-36 (1953). The great weight of authority suggests that where, as here, the disputed conduct consists of merely implementing and enforcing mandatory regulations, the requisite halo of policy-making is not present. *See, e.g., United Scottish Insurance Co.* v. *United States*, 692 F.2d 1209, 1212 (F.A.A.'s negligent certification of aircraft not within discretionary function exception, noting "F.A.A. officials enforce the requirements by inspecting the aircraft, but cannot in any way change or waive safety requirements. Since no room for policy judgment or decision exists, a discretionary function is not being performed...."); *Schindler* v. *United States*, 661 F.2d 552, 556 (6th Cir. 1981) (regulatory approval granted in conformance with federal regulatory

criteria not discretionary function); *Downs* v. *United States*, 522 F.2d 990, 997-98 (6th Cir. 1975) (exception only encompasses exercise of quasi-legislative or quasi-judicial function; mere fact that governing regulations permit choosing alternative courses of action does not invoke exception); *Griffin* v. *United States*, 500 F.2d 1059, 1066 (3d Cir. 1974) (fact that implementation of regulation calls for some judgmental determination with reference to criteria in regulation does not invoke exception as such determinations are of expert rather than public policy character).

Here, there is no dispute that the applicable MESA regulations compelled the erection of the handrail. 30 C.F.R. § 55.9-7 was a mandatory standard requiring that conveyors be either guarded or equipped with emergency stop devices; in this case, the inspectors knew that the handrail option had to be chosen. The inspectors were required by 30 U.S.C. § 727(b) to, and did, issue the corrective order. While the inspectors were also adjured by the MESA Inspection and Investigation Manual to "not create a dangerous situation in enforcing compliance with a standard," such an instruction is hardly more than a restatement of the due care incumbent on any civil servant carrying out predetermined regulatory imperatives; it does not call for the exercise of quasi-legislative or -judicial judgment, *Downs*, 522 F.2d at 997-98.

By contrast, *Bernitsky* v. *United States*, 620 F.2d 948 (3d Cir. 1980), *cert. denied*, 449 U.S. 870 (1981), cited by the government, involved a mine inspector's issuance of a withdrawal order after the mine's repeated failure to comply with citations. In holding such action within the "discretionary function" exception, the court

emphasized that the controlling statutory provision required the inspector, before issuing such an order, to determine such discretionary factors as "imminent danger" and a "reasonable time" for abatement, and to choose among "different types of enforcement actions available." 620 F.2d at 954-55. Here, however, the applicable regulations made clear that there was only one enforcement action available upon discovery of the conveyor's condition: the abatement order which effectively compelled the construction of the handrail. In any event, to the extent that *Bernitsky* can be read as a blanket extension of the "discretionary function" exception to all regulatory enforcement, we think that it fails to properly respect the distinction between policy-making and implementation articulated in the Supreme Court's *Dalehite* decision and subsequent appellate interpretations, including directly apposite inspection cases such as *United Scottish Insurance Co., supra.* If the nearly automatic issuance of the citation here were considered to be a "discretionary function," it would be hard to imagine any governmental activity which would be actionable under the FTCA.

IV.

We now reach the question that is formally before us on appeal: the correctness of the district court's finding that any negligence of the government inspectors was not the proximate cause of Donald Hylin's death. Although the trial judge did not make a specific finding that the government inspectors were negligent in the performance of their good samaritan tasks, the trial court's "inquiry into proximate causation presupposes an affirmative finding of negligence." *Glenview Park*

District v. *Melhus*, 540 F.2d 1321, 1325 (7th Cir. 1976), *citing* 65 CJS *Negligence* § 13 at 1134 (1966). The evidence in the record as it appears before this court supports a finding that the MESA inspectors were negligent in failing to take into account the effect of the Notice of Violation which resulted in the construction of the handrails which narrowed the passageway and forced the workers to walk by the dangerous junction box.

The Notice of Violation No. 53 was considered a mandatory notice. 30 C.F.R. § 55.9-7 requires that "unguarded conveyors with walkways shall be equipped with emergency stop devices or cords along their full length." The MESA inspectors had no choice but to issue the notice. There was no negligence, and the plaintiff does not so claim, in the issuance of Notice of Violation No. 53 alone. The inspector's negligence was in failing to consider the consequences of their action. The MESA Inspection and Investigation Manual instructs that "[a]n inspector shall consider his action during the inspection and shall not create a dangerous situation in enforcing compliance with a standard." MESA inspectors Donald Johnson and John Guthrie failed to do so. While liability under the FTCA cannot be based on the violation of a federal statute or regulations, the regulations may provide guidance as to the standard of care that a reasonable person owes a given situation. *United Scottish Insurance Co. (I), supra*, 614 F.2d at 195 n.9 ("Once the court has found an actionable duty under state law, the federal regulation may well have provided relevant evidence as to what conduct would be reasonable under all the circumstances"). The MESA manual provides such a standard of care in this case,

and the inspectors failed to perform their jobs at that level.

The negligence of the inspectors in failing to consider the consequences of the issuance of the Notice of Violation substantially increased the risk and made it almost inevitable that someone would be harmed by the dangerous junction box. Although the presence of the junction box and its condition were not affected by the Notice of Violation, the workers at the Ristokrat Mine were. The erection of the guardrail narrowed the gap between the junction box and the conveyor by at least four inches, to fourteen inches, thus making it more difficult to pass by the box without coming in contact with it. The railing also forced the workers to cease their practice of crossing over the conveyor at a point beyond the box and to walk past the box, and through the narrow gap, whenever they needed to go to the dust bin area.

The district court found, however that the issuance of the Notice of Violation No. 53 was not a proximate cause of Donald Hylin's death. Under Illinois law, questions of proximate causation are questions of fact, *Ney* v. *Yellow Cab Co.*, 2 Ill.2d 74, 84 (1954); *Ray* v. *Cock Robin, Inc.*, 57 Ill.2d 15, 23 (1974); *Watson* v. *Chicago Transit Authority*, 12 Ill. App. 3d 684, 692 (1st Dist. 1973); *Dooley* v. *Darling*, 26 Ill. App.3d 342, 354 (5th Dist. 1975), and such determinations are therefore to be reviewed under the "clearly erroneous" standard of Fed. R. Civ. P. 52(a). Within the clearly erroneous standard, this court has enunciated a broad scope of review when the basic facts of the case are not in dispute. *City of Mishawaka, Indiana* v. *American Electric Power Co.*, 616 F.2d 976, 979 (7th Cir. 1980); *Flowers*

v. *Crouch-Walker Corp.*, 552 F.2d 1277, 1284 (7th Cir. 1977); *Apolski's* v. *Concord Life Insurance Co.*, 445 F.2d 31, 34 (7th Cir. 1971); *Yorke* v. *Issei Produce Co.*, 418 F.2d 811, 814 (7th Cir. 1969). As we stated in *Yorke*

> When the factual determination is primarily a matter of drawing inferences from undisputed facts or determining their legal implications, appellate review is much broader than where disputed evidence and questions of credibility are involved.

Id. at 814. The facts in the present case are largely undisputed. The government presented no witnesses or exhibits. The credibility of the witnesses that did testify was not challenged and there were no inferences to be drawn from conflicting testimony. A substantial part of the record consisted of stipulation of fact and disposition testimony of the MESA employees. The only real dispute at the trial was the legal significance of the agreed upon occurrences. While we are not free to substitute our own judgment in the matter, we may reverse if, after a review of the evidence, "we are left with the definite and firm conviction that a mistake has been made." *Glenview Park District*, 540 F.2d at 1324. As to appellant's second claim, regarding the construction of the handrails, we have such a conviction.

The trial court's finding that the MESA inspectors' negligence in failing to consider the consequences of the issuance of a Notice of Violation for lack of handrails or emergency stop device on the conveyor belt was not the proximate cause of Donald Hylin's death seems to have turned on three determinations. The first was the drawing of a semantic distinction between a "barricade" which plaintiff alleged had been ordered and a "handrail

or barrier" which was constructed. The second basis of the trial court's finding was that the MESA inspector did not order the installation of the handrail but left the operator of the mine with the option of installing either an emergency stop device or the handrail. And the third apparent basis, although explicitly mentioned by the trial court only in connection with the plaintiff's negligent inspection theory, was that the accident was due "entirely" to the company's negligent maintenance of the junction box rather than to any acts or omissions of the MESA inspectors. We shall address each ground.

First, whatever the definitional distinctions between "barricade," "barrier," and "handrail," one of the effects of the installation of the two-by-four device was clearly to prevent the workers from crossing the conveyor belt as they had prior to its construction. The MESA inspectors, Donald Johnson and John Guthrie, both testified that this was one purpose of the handrail. Any determination that the issuance of Notice of Violation No. 53 was not a proximate cause cannot be properly based on the semantic characterization of the device constructed by Ristokrat in response to the notice. It is clear that one purpose of the "handrail" or "barrier," and its major effect, was to prevent the workers from crossing the conveyor belt and to force them to walk down the left side of the belt and to pass by the faulty junction box.

The trial court's second and third determinations that led to its finding of no proximate cause were its finding that Notice of Violation No. 53 was not an order to construct the handrail but instead "was a report that noticed violations and allowed Ristokrat to elect how to abate those violations and the authorities at Ristokrat

decided that the best way to do it was the erection of the handrail..." and that, in any event, the true cause of the accident was the defective junction box, not the handrail order. But it is undisputed that Notice of Violation No. 53 left Ristokrat with a choice as to how to correct the violation. Ristokrat could have installed an emergency stop device or the handrail. But it is also undisputed that the emergency stop device was not feasible, given the nature of the mine's continuous operation, and that the inspectors were aware of this fact. Ristokrat did not have the option of ignoring the Notice of Violation; to do so could lead to either criminal penalties or a debarment order closing the conveyor room. 30 U.S.C. § 727(b). MESA inspector Guthrie knew that Ristokrat's response to Notice of Violation No. 53 would be to install the handrails and that the result of this installation would be to redirect worker ingress through a narrow passageway past the junction box whose dangerous condition he observed. And on a follow-up spot inspection conducted on March 1, 1977, Guthrie observed, and his report reflected, that Ristokrat's response to the notice had been to erect the handrails. The trial court was correct in finding that Notice of Violation No. 53 was not an order to erect a barricade. But we feel compelled to respectfully express our view that the court erred in drawing certain conclusions from this finding.

The authorities at Ristokrat did "choose" to erect the handrail over the infeasible emergency stop device. Likewise, they chose to leave the junction box in its defective condition. These choices, however, do not amount to unforeseeable, independent and intervening causes which break the chain of causation from the in-

spectors' negligence to the subsequent death of Donald Hylin. Under Illinois law, proximate cause is that cause which, in natural or probable sequence, produces the injury complained of. It need not be the only cause, nor the last or nearest cause. It is sufficient if it concurs with some other cause acting at the same time, which in combination with it, causes the injury. *Nelson* v. *Union Wire Rope Corp.*, 311 Ill. 2d 69, 88 (1964); *Ray* v. *Cock Robin, Inc.*, 57 Ill. 2d 19, 23 (1974); *Watson* v. *Chicago Transit Authority*, 12 Ill. App. 3d 684, 692 (1st Dist. 1973); I.P.I.2d, § 1501 (1971). For our purposes, there are two important facets to Illinois' definition of proximate cause.

The first is that there may be more than one proximate cause of the injury. The fact that the owners of the Ristokrat Mine were also negligent in failing to keep the junction box in safe condition or that their negligence was "closer" to the injury, in that the junction box was the instrument of death, does not necessarily break any causal connection that may exist between the negligence of the MESA inspectors and the death of Donald Hylin. "It is . . . well established [in Illinois] that where the concurrent negligence of two parties causes injury which would have been avoided but for the negligence of either, the negligence of each is the proximate cause of the injury." *Dooley* v. *Darling*, 26 Ill. App. 3d 342, 354 (5th Dist. 1975).

The second aspect of the Illinois definition of proximate cause is that liability extends to the injuries that are the natural and probable consequences of the negligence. The natural and probable consequences include any intervening cause which "the first wrongdoer might have reasonably anticipated . . . as a natural and proba-

ble result of the first party's own negligence." *Merlo* v. *Public Service Co. of Northern Illinois*, 381 Ill. 300 (1943). "The intervention of independent, concurrent or intervening forces will not break the causal connection if the intervention of such independent force was itself probable and foreseeable." *Wintersteen* v. *National Coperage and Woodenware Co.*, 361 Ill. 95 (1935). *See also Neering* v. *Illinois Central Railroad Co.*, 383 Ill. 366, 380-81 (1954); *Ney* v. *Yellow Cab Co.*, 2 Ill.2d 74, 79-81 (1943). Ristokrat's response to the Notice of Violation was not only probable and foreseeable but inspector John Guthrie left the mine knowing that the handrail would be installed and consequently that the workers would be forced to pass closely by the junction box whose dangerous and defective condition the inspectors observed. We thus believe that the trial court erred in determining that the issuance of Notice of Violation No. 53, without considering the consequences thereof, was not a proximate cause of Donald Hylin's death.

CONCLUSION

For the foregoing reasons, we hold that a cause of action exists under the Federal Tort Claims Act, 28 U.S.C. § 2674 *et seq.* for the negligent inspection of a mine, conducted under the authority of the Federal Metal and Nonmetallic and Mine Safety Act, 30 U.S.C. § 721 *et seq.* (1971), when such negligent inspection increases the risk of harm to third persons. We reverse the trial court's finding that the negligence of the Mine Enforcement and Safety Administration inspectors was not the proximate cause of Donald Hylin's death, and remand for further proceedings consistent herewith.

REVERSED AND REMANDED.

BAUER, *Circuit Judge*, dissenting. I do not agree that plaintiff's second theory of liability, that by their enforcement of mandatory safety standards requiring handrails the federal mine inspectors negligently enhanced the risk of injury from the defective junction box, states a cause of action under Illinois law. Therefore, I respectfully dissent.

The instrumentality of harm in this case, both before and after the handrails were installed, was the defective junction box. Thus, plaintiff's first theory of liability was premised on the federal inspectors' negligent failure to observe the hazard created by the junction box and to order the hazard abated. The district court denied recovery under this theory on the basis that the inspectors' failure to inspect and cite the defective junction box, even if negligent, was not the proximate cause of Hylin's death.

The majority concedes that plaintiff's theory of mere negligent failure to inspect the junction box and order correction is troublesome. Nonetheless, the majority imposes liability on the basis that the inspectors negligently enhanced the risk of injury from the defective junction box. I am not satisfied, however, that plaintiff's two theories are sufficiently different to allow of this distinction.

The risk, if any, that arose from the inspector's order that handrails be installed was not inherent in the handrails. Rather, the risk was that by reducing the free access past the junction box by four inches there was an increased probability that a worker would make physical contact with the defective junction box. And this risk, the risk of physical contact with the junction box,

could only have been avoided by inspection and correction of the junction box itself.

Unlike the majority, I am unable to draw a bright line between "mere negligent failure to inspect the junction box and order correction," *ante* at 7, and what I consider to be mere negligent failure to inspect the junction box in conjunction with its environs and order correction. Thus, under the circumstances of this case, I would find that plaintiff has failed to state a cause of action under Illinois law. Accordingly, I would hold that plaintiff's cause of action under the FTCA must likewise fail.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

No. 81-2931

DONNA HYLIN, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF DONALD HYLIN, DECEASED, PLAINTIFF-APPELLANT,

vs.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

Appeal from the United States
District Court for the Northern District of
Illinois, Eastern Division.
No. 78 C 1742
George N. Leighton, *Judge.*

December 7, 1983

Before
HON. WILLIAM J. BAUER, *Circuit Judge*
HON. HARLINGTON WOOD, JR., *Circuit Judge*
HON. JESSE E. ESCHBACH, *Circuit Judge*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by counsel for defendant-appellee, no

judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

No. 81-2931

DONNA HYLIN, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF DONALD HYLIN, DECEASED, PLAINTIFF-APPELLANT,

vs.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

Appeal from the United States
District Court for the Northern
District of Illinois, Eastern Division
No. 78 C 1742
Judge George N. Leighton

August 23, 1983

Before
HON. WILLIAM J. BAUER, *Circuit Judge*
HON. HARLINGTON WOOD, JR., *Circuit Judge*
HON. JESSE E. ESCHBACH, *Circuit Judge*

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the

said District Court in this cause appealed from be, and the same is hereby REVERSED, with costs, and the case is REMANDED, in accordance with the opinion of this Court filed this date.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 78 C 1742

DONNA HYLIN, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF DONAL HYLIN, DECEASED, PLAINTIFF,

vs.

UNITED STATES OF AMERICA, DEFENDANT.

PARTIAL TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the HON. GEORGE N. LEIGHTON, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Thursday, November 5, 1981 at the hour of 11:30 a.m.

APPEARANCES:

MR. ROBERT B. PATTERSON
111 West Washington Street, Room 1817
Chicago, Illinois 60646
appeared on behalf of the Plaintiff;
MR. JAMES P. KLAPPS
MS. MARY GRAD
United States Department of Justice
Torts Branch, Civil Division
Safeway Building, Suite 872
Washington, D.C. 20530
appeared on behalf of the Government.

THE COURT: This is a civil action under the Federal Tort Claims Act by Donna Hylin, individually and as

Administrator of the Estate of Donald Hylin, Deceased, against the United States. The Court, as required by the statute, has heard the case without a jury and having heard testimony of witnesses, admitted in evidence Exhibits, makes the following findings of fact:

The trial has been bifurcated as to liability and damages, and the evidence shows that on September 1, 1977, the plaintiff's decedent, Donald Hylin, was an employee of the Ristokrat Clay Products Company in the Village of Lowell, LaSalle County, Illinois.

On that day, at the end of the afternoon's work shift, he was found lying dead on a dirt walkway extending between a conveyor and the wall on which hung an electrical junction box containing exposed wires. There were no witnesses to the death of Donald Hylin.

Burn marks found on the back of his left shoulder, skin and hair found on the wires and the dimension between the floor and the wires demonstrate that Hylin suffered an electrical contact with the exposed conductor, which caused his death by electrocution.

The room in which the box was located contained a conveyor which ran in a generally north-south direction, two narrow walkways on each side. The walkway on the right or west side of the conveyor starts at the south end of the conveyor. The walkway on the left side, or east of the conveyor, which runs along the wall on which the junction box was hung, runs the entire length of the conveyor in that room and then continues up an incline ramp to the dust bin area.

The electrical junction box in question was hung on the wall approximately half way down the walkway. The top of the box was five feet three inches from the ground and the dimensions of the box were twelve

inches high, eight and one-half inches deep and eighteen inches wide.

The diagonal clearance between the junction box and the handrail which was in place on September 1, 1977 along the conveyor, was approximately fourteen inches. That clearance had been reduced by aproximately four inches by the installation of a handrail which was constructed with vertical pieces of two by four lumber, at which were attached horizontal railings of two by four lumber.

Railings on both sides of the conveyor were installed by the operator after February 10, 11, 1977, in response to a notice of violation issued during an inspection of the conveyor room by Donald Johnson and John Guthrie of the Mine Enforcement and Safety Administration of the Bureau of Mines of the Department of Interior of the United States government. The mandatory requirement which the notice required to be abated, required either handrail or emergency stop device. Which of these methods of abating this violation was a matter left to the operator.

At no time did any MESA employee order George McMahon or any Ristokrat employee to install a barrier or handrail to abate the violation cited in Notice 53.

Paragraph 53 of the Mine Enforcement and Safety Administration Notice of Violation issued after the February 10, 11, 1977 regular inspection directed Ristokrat to abate the violation at the conveyor by either installing handrails or an emergency stop device.

When the electrical junction box in question on the wall of the conveyor was open, it constituted a serious and imminent danger to a person who would pass it if, at the time, the conductor was in such a condition that

there would be no means of retaining the lid in a closed position, and thus, there would be inadequate insulation at the upper righthand corner where conductors entered the box. A damaged frame, which is evidenced from the pictures of it, would further degrade the ability of the box to remain closed and holes in the lid would signify that a ground fault condition would exist and might continue to exist.

The damaged condition of the box, being the holes in the lid, the damaged frame, the inadequate insulation and the lack of effective means to keep the cover closed had existed at various times for many years prior to September 1, 1977, and at least since the time of a short circuit in the box some seven or eight years before, that left a hole that was visible at or about the time of the incident in question.

Prior to the incident, on September 1, 1977, the MESA inspectors never inspected the junction box located at the incline conveyor belt area. Prior to the installation the handrail, done in response to the MESA citation, the employees at Ristokrat customarily traveled between the grinding room and the dust bin area by walking along the right west side of the conveyor to its south end and then by crossing the conveyor and then by walking up the incline ramp to the dust bin area. This route was easier than walking down the left, or east, walkway, because it was wider and was not obstructed by chutes and an electric junction box which partially obstructed the left walkway.

At the time of the inspection on February 10, 11, 1977, the senior MESA inspector, Donald Johnson, knew that men followed the path down the right side of the conveyor and would cross the conveyor to travel to

the dust bin because he saw footprints, indicating such conduct, and from conversation during the inspection and post-inspection conference.

As a clay mine operation, Ristokrat was subject to the jurisdiction of the Mine Enforcement and Safety Administration. It was MESA's function, under the authority of the Secretary of the Interior, to enforce the provisions of the Metal and Nonmetallic Mine Safety Act, 30 U.S.C. Section 721, et seq., as amended including the mandatory safety standards promulgated thereunder and published at Title 30, Part 55, of the Code of Federal Regulations.

On and prior to September 1, 1977, MESA's function included the power to issue notices of violation which required mine operators to eliminate dangerous conditions or practices which violated mandatory safety standards. Refusal to comply with notice of violation subjected the mine operator to sanctions such as closure of the operation and, in some instances, where applicable, criminal penalty.

As a clay mine operation, Ristokrat was subject to the jurisdiction of the Mine Enforcement and Safety Administration. It was MESA's function, under the authority of the Secretary of the Interior, to enforce the provisions of the Metal and Nonmetallic Mine Safety Act, 30 U.S.C., Section 721, et seq., as amended, including the mandatory safety standards promulgated thereunder and published under Title 30, Part 55 of the Code of Federal regulations.

On February 10 and 11, 1977, MESA Inspector, Donald Johnson, and Trainee John Guthrie, conducted a regular inspection of the Ristokrat plant, which regular inspection required them to inspect every aspect of the

operation of the plant for safety and health hazards, including the electrical junction box on the wall of the conveyor room.

John Guthrie has testified in this case that he either could not recall seeing the box at the time of the February 10, 11, 1977 inspection or that he saw the box and paid no attention to it.

Donald Johnson has testified in this case that either he did not see the box or that he did see the box and did not observe, readily observe, the holes in the cover thereof at the time of the February 10-11 inspection.

On March 1, 1977, John Guthrie returned to the conveyor room at the Ristokrat plant on a compliance spot inspection. At that time, John Guthrie verified that the handrails on both sides of the conveyor had been installed, but he did not see or inspect the electrical junction box which obstructed passage through the walkway on the left side of the conveyor.

The Ristokrat operation had only 47 employees and did not have a safety department or an electrical engineer on its staff. Prior inspections of this plant, going back to the time the policy of the government to perform such inspections began, to and including the last inspection made by MESA agents before September 1, 1977, does not disclose that any inspector ever saw or noticed this electrical junction box which, on September 1, 1977, caused the death of Donald Hylin. Employees of Ristokrat, Billy Beavers, and Andy Stachowiak, who were in or around the place where this junction box was located, have testified that they didn't recall seeing that box.

From these facts, the Court reaches the following conclusions of law:

First, it has jurisdiction of the parties and the subject matter pursuant to the provisions of United States Code, Section 1346(b) and the provisions of the Federal Tort Claims Act, 28 U.S.C. Section 2671 et seq.

The complaint in this case was tested by motions for summary judgment and motion to dismiss and on the facts alleged, this Court found that it stated a claim for relief and, therefore, it submitted the matter to the jurisdiction of this Court, pursuant to the applicable statute.

The Federal Tort Claims Act provides a remedy against the United States for, and I quote:

> "Personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law where the act or omission occurred."

That quotation comes from 28 U.S.C., Section 2674.

Previously, at pre-trial proceedings, this Court denied defendant's motion to dismiss and for summary judgment, the latter on the ground that—and I quote:

> "Since plaintiff has alleged in her complaint that the Mine Enforcement and Safety Administration ordering the installation of the barricade created a hazardous condition that caused her husband's death, it cannot be determined as a matter of law that defendant did not have a duty to oversee the correction of such a condition."

In ruling on the motion to dismiss, this Court predicated its ruling entirely on the allegation contained in the complaint, which admitted the facts alleged as true, that the defendant had ordered the installation of a bar-

-icade and thus created a hazardous condition that caused her husband's death, "it cannot be determined as a matter of law that defendant did not have a duty to oversee the correction of such a condition."

In ruling on the motion to dismiss, this Court predicated its ruling entirely on the allegation contained in the complaint which admitted the facts alleged as true, that the defendant had ordered the installation of a barricade and thus, created a hazardous condition which caused her husband's death.

These were the grounds for the denial of the motion to dismiss and the motion for summary judgment.

The Court has reviewed the affidavits in a motion for summary judgment and again refreshes its recollection that the affidavits and counter-affidavits raised or indicated the record contained material issues of fact, namely, whether or not the United States, acting through its MESA agents, had, in fact, ordered the erection of a barricade so that it caused a condition to exist that contributed or caused the death of the plaintiff' intestate.

Now, throughout the course of this trial, the plaintiff has urged two theories or predicates of tort liability. The first of these theories revolves around the alleged failure of Federal Mine Inspectors to have discovered, in the course of statutory authorized enforcement inspections, the existence of a certain dangerous condition with respect to the electrical junction box which electrocuted plaintiff's decedent.

Second, the plaintiff maintains that the mine inspector "ordered that a barricade be installed on the right side of a conveyor, thereby forcing employees to use the narrow walkway on the left side of the

conveyor, which placed them in close proximity to the defective junction box."

In the course of this case, including the argument of counsel in summation, there has been a modification of this position by the plaintiff and the Court assumes that this modification has been adopted in order to adjust to the evidence which shows without question that no one employed by the United States ever ordered the authorities at Ristokrat to erect a barricade. What happened was, the evidence shows without question, was a report that noticed violations and allowed Ristokrat to elect how to abate those violations and the authorities at Ristokrat decided that the best way to do it was the erection of the handrail which is shown on Plaintiff's Exhibits 11 and 14.

Therefore, the allegation of the complaint that led the Court to denying the defendant's motion to dismiss and the issues of fact that arose in summary judgment, are not supported by the evidence heard by the Court at the trial of the case on the merits.

With respect to the contention that the failure of MESA inspectors to have discovered and caused the correction of defects in the junction box, this Court concludes on the evidence it has heard that the record does not support an undertaking to render such service which, as such, would allow the imposition of liability under any cognizable common law theory of recovery.

The defect in the argument made in this case is the failure of plaintiff to understand that under fundamental law of tort liability of Illinois and every American jurisdiction with which this Court is familiar, there cannot be liability unless the evidence shows that there

was negligence and that the negligence of the defendant or its agents caused the injury to the plaintiff.

In this case, the evidence shows that the negligence that injured the plaintiff through the death of her intestate, Donald Hylin, was the defective electrical junction box. That defective electrical junction box was on that wall from the time evidently this clay company occupied the building. It has been estimated either in documents which the Court has read or in testimony of witnesses, that this electrical junction box has been on this wall for some 50 years. It hasn't been noticed by anyone and whether or not it was always in the defective condition it was in on September 1, 1977 is not clear from the evidence. It is obvious that it was defective on September 1, 1977 because the parties agree that it electrocuted Donald Hylin. So, that is what caused the death of Donald Hylin, not the failure of the inspectors to see it, not the failures of the inspectors to notify Ristokrat about it, not the erection of the barrier as is described by the plaintiff, or barricade, or as the evidence shows a handrail put there legally, lawfully and properly to comply with a notice of violation, but, the defect in the box, in other words, the negligence of Ristokrat caused the injury to the plaintiff, to the death of her intestate.

That being so, there is no theory of liability that can be imposed on the United States government, for the simple reason that the evidence doesn't show one important requirement in the law of torts, that the negligence of the defendant and its agents caused the injury to the plaintiff, because the cause of the injury was entirely the result of a defective electrical junction box that was in that wall and not seen by anybody, including Donald Hylin's fellow employees.

Therefore, for these reasons, judgment will be entered for the defendant, the United States. Costs to follow in accordance with statute in such cases.

That is the ruling of the Court.

These findings will be part of the record. As I said, if there are additional ones that you think have not been considered by the Court that should be considered to complete this record, you may propose them and I will consider such requests.

Thank you very much.

MR. PATTERSON: One question, Your Honor.

THE COURT: Yes.

MR. PATTERSON: Is judgment entered as of today?

THE COURT: Yes, judgment will be entered as of today.

MR. KLAPPS: Thank you, Your Honor.